

22 March 2018

The South African Revenue Service
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BY EMAIL: policycomments@sars.gov.za

RE: COMMENTS ON DRAFT IN15 ISSUE 5 – EXERCISE OF DISCRETION IN CASE OF LATE OBJECTION OR APPEAL

The comments of the SAIT Tax Administration Technical Work Group on the Draft Interpretation Note 15 issue 5 – Exercise of discretion in case of late objection or appeal are enclosed in the Annexure. We trust that you will find our detailed comments and references to case law helpful. We appreciate the opportunity to comment and would welcome further dialogue.

Yours sincerely

Patricia Williams
Chair of the Tax Administration Technical Work Group

ANNEXURE

1. BACKGROUND

- 1.1 Interpretation Note 15 (“**IN15**”) is being updated, both in relation to changes to relevant time periods, and to insert further case law references.
- 1.2 We take this opportunity to comment on the draft revised interpretation note, not only in relation to changes that are being made, but also for pre-existing areas where we feel that changes are perhaps appropriate.

2. PAGE 5 PARAGRAPH 4.2.1: REASONS FOR THE DELAY – “REASONABLE GROUNDS” ISSUE

- 2.1 This section contains the statement: “*Generally, the requirement of reasonable grounds will be met if the delay was caused as a result of circumstances beyond the taxpayer’s control.*”
- 2.2 It is true that, if circumstances beyond the taxpayer’s control caused the delay, these would comprise reasonable grounds. But reasonable grounds are far broader than this.
- 2.3 For this reason, it is submitted that this statement is confusing and misleading. “Circumstances beyond the taxpayer’s control” is a different legal test, appearing in different parts of the tax legislation. It is not equivalent to “reasonable grounds” for the delay.
- 2.4 It is submitted that IN15 would be improved by a proper section dealing with “reasonable grounds”, where the correct case law (test being the reasonable person) is discussed. SARS could be guided by the draft guide on understatement penalties read with the various submissions already made by interested parties on the most relevant and appropriate case law to be referenced here.

3. PAGE 5 PARAGRAPH 4.2.1: REASONS FOR THE DELAY – “AS SOON AS POSSIBLE” ISSUE

- 3.1 This section contains the statement: “*The taxpayer will, however, still be required to satisfy the senior SARS official that under the specific circumstances the objection was lodged as soon as possible.*”

- 3.2 It is submitted that this statement is confusing and misleading. It appears to imply some type of “impossibility of performance” standard, which is a different concept that is not equivalent to “reasonable grounds” for the delay.
- 3.3 This wording could potentially be replaced with something along the following lines:

“The taxpayer will still be required to satisfy the senior SARS official that the reasonable grounds for delay explain the delay as a whole.”

This would convey to taxpayers that the delay that must be explained is the delay as a whole, and for example reasonable grounds for a one-week delay would not entitle the taxpayer to simply then do nothing for a further period of weeks.

4. PAGE 7: CONSTITUTIONAL CASE LAW QUOTED

- 4.1 IN15 quotes *S v Dlamini; S v Dladla & others; S v Joubert; S v Schietekat*¹. The quoted excerpt is where the court defended the legislative choice not to clearly demarcate what would constitute exceptional circumstances. The purpose was accordingly to support the fact that exceptional circumstances is not a restrictive list. This is not conveyed by the context in which IN15 quotes the excerpt.
- 4.2 It is therefore suggested that there is another important excerpt from this case that should be included, as follows:²:

“In requiring that the circumstances proved be exceptional, the subsection does not say they must be circumstances above and beyond, and generically different from those enumerated”, making it clear that even so-called “ordinary” circumstances may serve to establish “exceptional circumstances”.

5. PAGE 7: NEW CASE LAW INSERTED

- 5.1 It is submitted that a further case that is highly relevant, which should be referenced in IN15, is *S v Peterson*³:

¹ 1999 (7) BCLR 771 (CC), 1999 (4) SA 623 (CC)

² 1999 (7) BCLR 771 (CC), 1999 (4) SA 623 (CC), paragraph 75

³ 2008 (2) SACR 355 (C) at para [55]

“Generally speaking 'exceptional' is indicative of something unusual, extraordinary, remarkable, peculiar or simply different... This may, of course, mean different things to different people (exceptional circumstances), so that allowance should be made for a certain measure of flexibility in the judicial approach to the question”.

6. PAGE 8: SECTION 218

- 6.1 Section 218 of the Tax Administration Act deals with exceptional circumstances in relation to remittance of percentage based penalties (for example the VAT and PAYE late payment penalties). IN15 notes, correctly, that this section is not directly relevant to late objections and appeals, but may be indicative of what might be considered to be exceptional circumstances.
- 6.2 IN15 provides examples of the items in section 218, but omits others, which provides for a skewed or misleading impression, which would again narrow the interpretation of exceptional circumstances by reference to remittance of punitive measures. Omitted from reference in IN15 are for instance the following real life examples:
- 6.2.1 Serious financial hardship (Section 164)
 - 6.2.2 Capturing error (by SARS)
 - 6.2.3 Processing delay (by SARS)
 - 6.2.4 Provision of incorrect information (by SARS)
 - 6.2.5 Delay in providing information (by SARS)
 - 6.2.6 No notification of assessment received from SARS
 - 6.2.7 Insufficient grounds for assessments issued by SARS (post request for grounds for assessments)
 - 6.2.8 Insufficient time provided (by SARS) for an adequate response to a request for information
 - 6.2.9 Any other circumstances of analogous (equivalent/similar) seriousness
- 6.3 As a result of the omission of items that would generally be considered much less “exceptional” than items like natural disasters, taxpayers may not be aware that there are

many other circumstances that could qualify them for condonation of their late objection and appeal.

7. PAGE 9 PARAGRAPH 4.6: INVALID OBJECTIONS ISSUE

- 7.1 IN15 states that a taxpayer may submit a new objection within a period of 20 business days of the delivery of the notice of invalidity of objection, without having to apply for condonation of the late objection.
- 7.2 A fairly recent problem area, is where SARS declares an objection “invalid” owing to documents not provided. In most instances, it appears that SARS misconstrues the requirements of rule 7(2)(b)(iii) to give SARS *carte blanche* to declare an objection invalid as a means to request further documents, rather than following the proper process in terms of rule 8 to request substantiating documents. This negatively impacts on taxpayer’s rights, because ordinarily a taxpayer is supposed to have 30 business days in which to provide the substantiating documents requested in terms of rule 8, plus a potential extension on reasonable grounds for a further period not exceeding 20 business days. In contrast, a purported invalidity notice on grounds of further documents required, would require submission within only 20 business days. If, then, the requested documents are voluminous, this would artificially push the taxpayer into the condonation process in terms of IN15. The legal test may also be artificially shifted from “reasonable grounds” to “exceptional circumstances”.
- 7.3 It is submitted that IN15 should clarify that, where a further information request by SARS following an initial objection results in a delay in lodging an objection, this will qualify as “exceptional circumstances” for the purpose of SARS’ discretion to condone late objections and appeals.
- 7.4 It should also be noted from a practical perspective and even though the IN quotes all days to be business days, taxpayers time and time again run into scenario’s where the SARS counts normal days which ultimately either leads to an invalid objection, need for condonation even refusals for condonation